IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3685 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ABDULNABI ABDULREHMAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3685 of 2001

MR ANIL VARMA for MR MM TIRMIZI for Petitioner No. 1

MR K.T.DAVE for Respondents No. 1-3

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 16/10/2001

ORAL JUDGEMENT

In exercise of powers under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985

('the Act' for short), Commissioner of Police, Surat City, Surat, vide order dated March 21, 2001 (Annexure-A to the petition) detained the petitioner/detenu.

2. From the averments made in the petition and the grounds of detention it is manifest that the detaining authority has considered the petitioner as a prohibition bootlegger within the meaning of Section 2(b) of the Act as one case under the Prohibition Act is registered against the petitioner which is pending investigation and the statements of two anonymous witnesses are recorded in an unregistered offence, and therefore, according to the detaining authority his activities are prejudicial to the maintenance of public order and therefore, powers under Section 9(2) of the Act are exercised by the detaining authority by not disclosing the identity of those witnesses and thereby detained the petitioner/detenu.

3. By filing this petition under Article 226 of the Constitution, the petitioner has assailed the impugned order of detention on various grounds and prayed to issue appropriate writ, direction or order quashing and setting aside the impugned order of detention and setting him at liberty forthwith.

4. Though the petitioner has challenged the order of detention on various grounds, Mr. Anil Varma, learned advocate for the petitioner has restricted his arguments to the effect that so far as one case under the Prohibition Act registered against the petitioner is concerned, it does not reflect the disturbance of the public order, it only reflects the disturbance of law and order situation, and, therefore the subjective satisfaction recorded by the detaining authority for exercising powers under Section 9(2) of the Act cannot be considered as genuine, and, therefore, order of detention stands vitiated. So far as the statements of two witnesses recorded by the detaining authority are concerned, it is pointed out by the learned advocate for the petitioner that though privilege is claimed, the same is not genuine in the absence of any reply affidavit and on both these counts the order of detention is vitiated. On the aforesaid premises he urged to allow the petition by quashing and setting aside the order of detention and setting the petitioner at liberty forthwith.

5. To buttress the aforesaid submission, he cited the following judgements:

i) PIYUSH KANTILAL MEHTA V. COMMISSIONER OF POLICE, AIR 1989 SC 491

ii) OM PRAKASH V. COMMISSIONER OF POLICE AND OTHERS, AIR 1990 SC 496, and

iii) RASHIDMIYA ALIAS CHHAVA AHMEDMIYA SHAIKH V. POLICE COMMISSIONER, AHMEDABAD AND ANOTHER, AIR 1989 SC 1703

6. Mr. K.T.Dave, learned AGP appeared for the respondent State and has contested the petition by making oral submissions. He has contended that so far as the privilege claimed by the detaining authority by not disclosing identity of the witnesses is concerned, the detaining authority in the impugned order has recorded how subjective satisfaction is genuine because according to him witnesses have expressed their fear in disclosing their identity and therefore privilege is rightly claimed by not disclosing the identity of the witnesses. What is empahasized by the learned AGP is that so far as one case registered against the petitioner under the Prohibition Act is concerned, undisputedly there is breach or disturbance of public order and not breach of law and order situation. Therefore, according to him, the activities of the petitioner are in the realm of breach of public order and hence the detaining authority has rightly considered Section 3(4) of the Act by observing that the activities of the petitioner are prejudicial to the maintenance of public order and the petitioner is engaged himself as a bootlegger which adversely affected the maintenance of public order and therefore prayed to dismiss the petition. In support of his contention, the learned AGP has placed reliance on the judgement in the case of KANUJI S. ZALA V. STATE OF GUJARAT AND OTHERS, 1999 (2) GLH 415.

7. I have considered the submissions advanced by the learned advocates appearing for the parties. I have also perused the averments made in the petition as well as the documents annexed therewith and the impugned order.

8. So far as the first contention with respect to statements of two anonymous witnesses which are recorded by the detaining authority is concerned, the privilege claimed under Section 9(2) of the Act is not genuine, has substance in view of the fact that the detaining authority has not filed any affidavit in reply by explaining the fact as to how the witnesses have expressed their fear before him. Therefore, on this ground the order of detention is vitiated.

9. So far as the second contention about

registration of one offence under the Prohibition Act is concerned, according to the learned advocate for the petitioner, the said activities cannot be said to be a breach or disturbance of public order but it is in the realm of breach of law and order situation.

10. In the case of PIYUSH KANTILAL MEHTA (supra) the Supreme Court has held that it may be that the detenu is a bootlegger within the meaning of Section 2(b) of the Act, but merely because he is a bootlegger he cannot be preventively detained under the provisions of the Act unless, as laid down in sub-Sec. (4) of Section 3 of the Act, his activities as a bootlegger affect adversely or are likely to affect adversely the maintenance of public order. A person may be very fierce by nature, but so long as the public generally are not affected by his activities or conduct, the question of maintenance of public order will not arise. In order that an activity may be said to affect adversely the maintenance of public order, there must be material to show that there has been a feeling of insecurity among the general public. If any act of a person creates panic or fear in the minds of the members of the public upsetting the even tempo of life of the community, such act must be said to have a direct bearing on the question of maintenance of public order. The commission of an offence will not necessarily come within the purview of 'public order'.

11. In Kanuji's case (supra), in para 6, the Supreme Court has observed that as already stated earlier, in this case the detaining authority has specifically mentioned in the grounds that the activity of the detenu was likely to cause harm to the public health and that by itself is sufficient to amount to affecting adversely the public order as defined by the Act. The detaining authority has also stated that as a result of resorting to violence by the petitioner for carrying on his bootlegging activity, even tempo of public order has also disturbed on some occasions. In view of the material on record it cannot be said that the satisfaction of the District Magistrate, in this behalf, was not reasonable or genuine.

12. In the case of Kanuji's case (supra), the Supreme Court has also considered three earlier decisions in the case of Piyush Kantilal Mehta (supra), Om Prakash (supra) and Rashidmiya (supra) and observed in para 4 that in none of the three cases relied upon by the learned counsel, the point whether public order can be said to have been disturbed on the ground that the activity of the detenu was harmful to the public health arose for

consideration and that the detaining authority has not recorded such satisfaction; moreover, in these three cases the detaining authority has referred to some incidents of beating but there was no material to show that as a result thereof even tempo of public order was disturbed, whereas in the case before the Supreme Court in the case of K.S.Zala V. State of Gujarat (supra), the detaining authority has specifically stated in the grounds of detention that selling of liquor by the petitioner and its consumption by the people of that locality was harmful to their health. It was also stated that the statements of the witnesses clearly show that as a result of violence resorted to by the petitioner even tempo of public life was disturbed in those localities for some time. That material on record clearly shows that the members of public of those localities had to run away from there or to go inside their houses and close their doors.

13. If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K.S.Zala (supra), i.e. with regard to the presence of credible material and as to how the detaining authority has made the mention against the petitioner being an obstruction to the public health and public order, I find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, privilege is not claimed genuinely. It is of course true that after narrating the particulars of the criminal cases, the detaining authority has mentioned that the activities of the petitioner were an obstacle to the public health and public order but this bald observations cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life was disturbed. No observation made in any part of the judgement can be read in isolation and bereft the context. The judgement is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgement are to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there. In the case of K.S.Zala (supra) before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and

the material on record had shown that members of the public of those localities had to run away from there and to go inside their houses and to close their doors. No such situation has been mentioned in the present case. Therefore, in my view, merely registration of the cases under the Prohibition Act by itself cannot be considered as in the realm of breach or disturbance of public order, merely it is a case of breach of law and order situation and therefore the subjective satisfaction recorded by the detaining authority is vitiated. Therefore, the order of detention on the basis of one case registered against the petitioner cannot be sustained and the petition deserves to be allowed.

14. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The impugned order of detention dated March 21, 2001 is hereby quashed and set aside. The petitioner/detenu is ordered to be set at liberty forthwith if not required in connection with any other case. Rule is made absolute. No order as to costs. Direct service is permitted.

(A.M.Kapadia, J)

Jayanti*